FILED
MAY 30 1991
OFFICE OF THE CLERK

No. 90-1678

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF COLORADO,
Petitioner

v.

PHILIP LESLIE GALIMANIS
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the Colorado Court of Appeals

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INTRODUCTION

Mr. Philip Galimanis was the accused citizen below and will be referred to by name or as the accused. The State of Colorado was the prosecution below and will be referred to as the state or the prosecution. References to volumes and page numbers in the following form: (vol. 1, p. 1), refer to the volume and page numbers of the record on appeal in the Colorado Court of Appeals.

STATEMENT OF THE PERTINENT FACTS AND PROCEEDINGS

Mr. Galimanis was involuntarily committed to a mental hospital in Denver in early 1981, at the age of 18, two years before he killed his girlfriend of a couple of weeks.[1] The commitment was due to his extremely psychotic and often violent behavior, particularly towards his mother. Mr. Galimanis' mental problems arose, according to the numerous

---

1. Mr. Galimanis killed Ms. McQueen two years to the day after his father died while Mr. Galimains was in the hospital.

psychiatrists who examined and/or treated Mr. Galimanis before and after his arrest, due to a psychotic attachment to his mother and his inability to separate himself from her. After a normal-seeming childhood he began to show definite signs of severe mental illness at about the age of fifteen. He had no criminal history before that point. His behavior became, by any standards, extremely bizarre, including compulsive walking around the house, irrational speech and continuous "insane" laughter, talking to himself, and extreme violence towards objects and his mother. Finally a psychiatrist to whom he was taken recommended that he be committed. Two experienced psychiatrists and a psychologist who examined and/or treated him before and during his commitment testified as to his severe mental illnesses. The treating psychiatrist diagnosed him as extremely psychotic at the time of his admission. His behaviors were bizarre and obviously inappropriate.

Mr. Galimanis was released from the mental hospital after a lengthy stay of ten months and after heavy drug treatment. He quickly disintegrated after he stopped taking his drugs, until he was acting even more bizarrely than before. For just a few examples, he would stay awake for days on end, talking and walking around his mother's house, and later his brother's apartment. His speech and thoughts were disjointed. He constantly thought people were following him. He had other irrational and bizarre delusions. His mother was finally forced to have him forcibly removed from her home by the police after he became violent and irrational. On one occasion he punched his mother and demanded that whoever was occupying his mother's body must leave it. Numerous lay witnesses testified at the sanity trial concerning his extraordinarily strange behaviors during this time. For example, he would enter restaurants, always ordering more than one meal for himself, talking on the phone to no one, rushing in and out of and around the restaurant, peering around walls, and carrying on very loud conversations with himself. He would stay awake for days on end, carrying a large can of coffee, talking to the television, screaming out the window at no one, and screaming at himself in the bathroom mirror, talking to dogs, and speaking generally in a bizarre fashion. He would sit in his dismantled car, honking the horn for hours. Shortly

before he decapitated his girlfriend of a few weeks with a pocket knife, apparently due to her decision to end their relationship, he walked back and forth on a basketball court for hours, slowly disrobing.

Before the sanity trial the prosecution filed a motion requesting that it be allowed to present evidence of Mr. Galimanis' assertion of his right to remain silent and right to counsel at the time of his arrest. The written motion alleged that, "[s]uch evidence is clearly probative of the defendant's state of mind at a time in close proximity to the date of the occurrence." At the hearing on the motion, the prosecution argued that it was permitted to present evidence of the accused's "assertion of his Fifth Amendment right."[2] The state argued that the evidence of Mr. Galimanis' assertion of those rights was "very probative of the issues in this case." Over objection, the trial court granted the motion. (vol. 7, p. 13)

Also before the sanity trial, the prosecution successfully moved for the trial court to rule that the state's evidence **not** be considered to be rebuttal of whatever evidence the accused presented. (vol. 1, p. 89; vol. 7, p. 2-5) In Colorado, as in Florida in *Wainwright v. Greenfield*, 474 U.S. 284 (1985), once some evidence which "raises" the issue of insanity has been presented, the burden of proving beyond a reasonable doubt that the accused was not insane at the time of the alleged offense falls on the prosecution. Colo. Rev. Stat. § 16-8-105 (2). Here, the state persuaded the trial court to rule that any evidence the state presents to show Mr. Galimanis' sanity not be considered rebuttal but, rather, be considered its case-in-chief. Thus, the state's various arguments concerning the "rebuttal" nature of the evidence of Mr. Galimanis' assertions of rights are not accurate, as a matter of fact and law in this case.

During opening statements the prosecution stated the following:

> So they take the defendant and they put him in Al Keiser's patrol car. While he is there, Al Keiser orally advises him of his *Miranda* rights, the rights you have probably all heard

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2. A copy of the state's motion is attached as Appendix 1. A transcript of the state's arguments is attached as Appendix 2.

> on TV a number of times. He does this orally and the defendant responds he understands and he says I want my lawyer. (vol. 8, p. 22)
>
> You will hear from Detective Light, who, down at the Denver Police Department, advises the defendant of the nature of the charge, what he was being held for, first degree murder. A written advisement form was used which you will see which outlines the *Miranda* warnings that Al Keiser gave orally. Those were explained to the defendant. He said he understood. He sat back in his chair and said I want my lawyer here. (vol. 8, p. 24-25)

Defense counsel did not mention the post-arrest conduct or statements of Mr. Galimanis during opening statement. Nor did the defense call any witnesses to testify concerning those events or statements. The state's attempts in its petition to suggest that Mr. Galimanis called any witnesses on the matter of his arrest , or first raised the subject with any witness, are totally baseless.

Mr. Galimanis presented evidence from several lay and expert witnesses concerning the onset and progression of his mental illnesses. These included family members and the non-forensic psychologist and psychiatrists who evaluated and treated him until his release from the mental hospital. The diagnosis was of an extremely severe borderline personality disorder, which included psychotic episodes of the sort he was suffering from when he was committed. That psychosis took months to suppress.

The state then called a police officer out of order. That witness testified about Mr. Galimanis' supposedly normal behavior at the time he was booked into jail. Defense counsel impeached the witnesses with reference to his notation on a form that Mr. Galimanis needed counseling and has suicidal ideations.[3]

Mr. Galimanis presented testimony from numerous lay witnesses concerning his bizarre behavior and obvious mental problems from the time of his release from the mental

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3. The state obviously attempts to suggest in its petition that it was actually Mr. Galimanis who first raised the issue of his conduct after his arrest with this police officer, as part of the state's scheme to represent its use of the evidence of Mr. Galimanis' assertions of rights as "rebuttal."

hospital until shortly before he killed his girlfriend.

Two experienced forensic psychiatrists and an experienced forensic psychologist testified as to Mr. Galimanis' severe mental illnesses, and one testified that in her opinion Mr. Galimanis was insane under Colorado law at the time of the killing. Their diagnoses differed only in the severity of the mental illnesses they perceived and their ability to totally rule out other illnesses. One psychiatrist, Dr. Kathy Morall, testified that Mr. Galimanis might actually be schizophrenic, but that he was at least suffering from an extremely severe borderline personality disorder with psychotic, schizophrenic features, and that he was in the throes of a psychotic episode at the time he killed his girlfriend. She testified that a psychotic episode connected with that disorder would be temporary rather than long standing, meaning it would last for hours or days rather than for weeks. Dr. Morall criticized the decision to release Mr. Galimanis from the mental hospital.

The state cross-examined Dr. Morall about the importance of Mr. Galimanis' ability to assert his right to remain silent at the time of his arrest. After establishing that Dr. Morall had read and considered the police reports, the prosecutor asked her:

> Q: Do you remember when the police came, they arrested him?
>
> A: Yes.
>
> Q: And they took him into custody?
>
> A: Yes.
>
> Q: And they read him his rights?
>
> A: Yes.
>
> Q: And he said, "I want my lawyer?"
>
> A: Yes. (vol. 10, p. 91-92)

Later, the following occurred:

> Q: We're not isolating it here. We are giving a whole bunch of facts which outline his activities, which shows not random but given his options some fairly rational things of what he was

doing?

A: I guess my interpretation of it would be giving

Q: And he even tells you where he's arrested, South Yates Way, and don't you think when someone is arrested and they are told, you are being charged with first degree murder and they read your rights to you, isn't it a natural response not to incriminate yourself? You don't want to tell them something that is going to make it easier?

A: There is an urgency to questions. I don't know that that would be a general statement I would agree.

Q: Don't you think someone who is charged with first degree murder is going to be aware there is a relative risk here to him?

A: It could be.

Q: That's one way of looking at it, right?

A: You could look at it.

Q: That's an inference you could draw from those facts, right?

A: Yes.

Q: That would be a reasonable inference?

A: I wouldn't draw them -- I wouldn't say someone else is being unreasonable. (vol. 10, p. 96-97)

A psychologist, Dr. Steven White, testified that his diagnostic impression was that Mr. Galimanis suffered from a borderline personality disorder with evidence of psychotic features, and a large number of features of more serious psychotic disorders. Dr. White could not rule out a final diagnosis of schizophrenia.

Another psychiatrist, Dr. Steven Miller, testified that the ultimate diagnosis of Mr. Galimanis -- borderline personality versus schizophrenia -- was irrelevant given the obviousness of his insanity.

The state cross-examined Dr. Miller about the importance of Mr. Galimanis' ability to exercise his rights:

Q: All right. Did you read the reports from Wheat Ridge and Denver concerning descriptions of his behavior while he was in the patrol car and also being advised of *his rights, asserting his rights*?

A: Yes.

Q: Isn't it true that in a forensic examination, that kind of evidence is important?

A: It was important.

Q: It was?

A: Yes.

Q: It shows some awareness of what is going on, the fact that he is charged with something very serious, *he elects to preserve his rights, to defend himself against those charges*; is that right?

A: It shows some awareness of that, probably. (vol. 11, p. 136-137, emphasis added).

Each psychiatrist testified that Mr. Galimanis was patently psychotic at the times of their evaluations of him.

The state called two lay witnesses to testify as to Mr. Galimanis' behavior before his arrest. Each initially asserted that he acted normally, but during cross-examination each admitted his strange and often bizarre behaviors. The prosecution called eight police officers to testify concerning Mr. Galimanis' behavior at the time of and after his arrest. The prosecution called Officer Keiser to testify as to his arrest of Mr. Galimanis and the assertion of rights by Mr. Galimanis. Keiser also testified as the statements he obtained from Mr. Galimanis after the assertion of rights. Keiser described Mr. Galimanis' 'normal' behavior. On cross-examination admitted that Mr. Galimanis carried on a chuckling, muttering conversation with himself in the police car.

There was no evidence or intimation that Mr. Galimanis possessed or owned a gun at any time. The supposed basis for Keiser's question about a gun was never shown.

Detective Light testified about Mr. Galimanis' assertion of his right to remain silent

at the Denver police station, and about his utterly disinterested demeanor at the time. Light described Mr. Galimanis' apparent ability to understand and respond to the *Miranda* advisements and questions.

Other police officers testified about their observations of Mr. Galimanis during the booking process. Mr. Galimanis recognized one officer as frequenting a bar near his apartment. Two officers stated that Mr. Galimanis showed no concern for what was going on while evidence was gathered and he was processed. At one point Mr. Galimanis said "Galimanis" four or five times for no reason.

The prosecution called two police officers to describe their contacts with Mr. Galimanis before this case. One arrested Mr. Galimanis for a DUI, at which time Mr. Galimanis spoke of his father -- who died two years to the day before Mr. Galimanis killed his girlfriend -- as is he were still alive. The other officer described the arrest of Mr. Galimanis for driving offenses and disturbance. He had been bit on the tongue by a woman he had tried to kiss, and he was proud of it. The officer felt that this was not strange behavior.

The state also called Dr. Wahl, a psychiatrist who had never before testified as to sanity. Dr. Wahl testified that he saw no evidence of psychosis or psychotic behavior by Mr. Galimanis at any time, including in his family history, or at the time of Ms. McQueen's death. He saw no evidence of any major mental illness in Mr. Galimanis. He opined that Mr. Galimanis was not legally insane, and that, even if he was psychotic before he killed his girlfriend, the experience of cutting of her head with a pocket knife would have shocked him back to reality.

The state also questioned Dr. Wahl about the significance of Mr. Galimanis' ability to assert his rights at the time of his arrest, as noted in Appendix G of the state's petition.

During closing arguments, the state argued that Mr. Galimanis' refusal to speak to the police was the "most telling" evidence of his sanity, as noted in Appendix H of the state's petition.

REASONS WHY THE WRIT SHOULD BE DENIED

INTRODUCTION AND SUMMARY OF THE ARGUMENTS

There exist several weighty reasons why the petition should be denied in addition to the lack of merit of the issues addressed by the state in its petition. Mr. Galimanis will first briefly summarize his arguments on the matters actually raised by the state, and then will address these additional reasons. He will then address the state's arguments in more detail.

The state presents two "questions" to this court. The first concerns only the state's evidence and arguments and comments at trial concerning Mr. Galimanis' assertion of *Miranda* rights to Officer Keiser, the first of the two policemen to whom he asserted his rights after receiving advisements. The state contends, to this Court for the first time, that it did not present evidence or arguments concerning Mr. Galimanis' post-advisement assertion of the right to remain silent at Mr. Galimanis' sanity trial in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) and *Wainwright v. Greenfield*, 474 U.S. 284 (1986), but merely used evidence and argument of Mr. Galimanis' assertion of his right to counsel. The state perceives some major distinction between the two scenarios. However, the state's argument is not supported by the facts of this case or the few authorities it cites. This argument is not supported by the record in this case, since the state clearly presented evidence of the assertion of the right to remain silent, and expressly and frequently commented on the assertion of that right. Further, this Court in *Greenfield* rejected the very distinction the state now proposes. The state's argument is also refuted by the state's own actions and words at trial, where it did not recognize or draw the distinction it now contends has some constitutional significance. Below the state correctly contended that Galimanis asserted his

right to remain silent until he consulted an attorney to Officer Keiser.

The state's second question concerns its "harmless error" assertion. Admitting that its evidence of and comments upon Mr. Galimanis' second assertion of the right to remain silent were error, the state contends that those errors were harmless in this case. The state does not assert that the introduction of evidence of and arguments concerning the first assertion of rights were harmless, if erroneous. The state's "harmless error" contention is founded on a fundamentally incorrect view of the facts of this case. Further, it is primarily based on the patently incorrect premise that the bifurcated nature of the sanity trial makes a fundamental difference in the nature of the constitutional violation which occurs when the state uses an assertion of *Miranda* rights against the accused. In fact, in *Greenfield* this Court rejected the precise arguments made by the state here.

The state must prevail on both in order to merit relief, since the first issue applies only to the first assertion of rights.

A. THIS COURT'S DECISION IN *WAINWRIGHT V GREENFIELD* IS DISPOSITIVE OF THE STATE'S ALLEGEDLY "UNRESOLVED" ISSUE, AND THERE IS NO CONFLICT OR DIFFERENCES AMONG COURTS.

In *Wainwright v. Greenfield*, this Court resolved the precise issue which the state here presents as an "unresolved" issue. In *Greenfield* the state introduced evidence of the accused's assertions of his *Miranda* rights, by way of his refusals to answer questions until consulting with an attorney. This Court expressly included the assertion of the right to counsel under *Miranda* within the purview of its decision. Among the several instances of this inclusion is the following, most direct one:

> With respect to post-Miranda warnings "silence," we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as a desire to remain silent until an attorney has been consulted.

Greenfield, 474 U.S. at 632, n. 13.

In *Greenfield*, according to the Florida Court of Appeals, the accused told the police he wanted to talk to an attorney before he talked to them. *State v Greenfield*, 337 So.2d 1021, 1022 (Fla.App. 1976). The Eleventh Circuit's opinion reflects that the accused's "only" response was that he wanted to speak to an attorney. *Greenfield v. Wainwright*, 741 F.2d 329, 330 (11th Cir. 1984).

This aspect of this Court's holding has been recognized and applied consistently since. *See e.g., Jacks v. Duckworth*, 857 F.2d 394, 401 (7th Cir. 1988) ("*Wainwright v. Greenfield* now makes clear that a statement that a person does not want to speak until an attorney has been consulted also constitutes 'silence' under *Doyle*."); *Sulie v. Duckworth*, 864 F.2d 1348, 1354 (7th Cir. 1988) (same); *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986) *rev'd on other grounds*, *Arizona v. Mauro*, 481 U.S. 520 (1987) (same); *State v. Hull*, 210 Conn. 481, 556 A.2d 154 (1989) (same). Thus, the question presented by the state has already been resolved by this Court.

Further, the Colorado Court of Appeal's decision does not conflict with the decision of any other court mentioned by the state. Contrary to the petition, the Pennsylvania Supreme Court did **not** hold in *Comm. v. Hunsberger*, 523 Pa. 92, 565 A.2d 152 (1989), *cert. denied*, 107 S.Ct. 1030 (1990), that assertions of the right to counsel in response to *Miranda* warnings, *i.e.*, assertions of the right to remain silent until after consulting with counsel, do not fall within the scope of *Greenfield*. There the state desired to present evidence of three spontaneous statements of an accused after the assertion of the right to counsel in response to *Miranda* warnings. Two of the statements, one a question concerning the relative competence of public defenders, the other a question to a judge as to how he could meet with the public defender in jail, "[were] not remotely indicative of the Appellee's intent to remain silent." *Hunsberger*, 565 A.2d at 155. Ironically, the Pennsylvania court affirmed the suppression of the third statement, which was a question by the accused to a district attorney as to whether she was his lawyer, and a statement that he did not want to talk to her further when he discovered she was not, because the statement "does tend to imply that he would

speak only to his attorney." *Id.* This, of course, after the accused asserted his right to remain silent by responding to the *Miranda* warnings by stating "that he wished to speak with an attorney." Id., at 153. In sum, *Hunsberger* supports Mr. Galimanis' position, not the state's.

Thus, the state's petition presents no "unresolved" issues, no conflicts among courts, and does not merit granting of the writ.

B. THE ISSUE PRESENTED TO THIS COURT WAS NOT PRESENTED TO THE STATE COURTS BELOW.

The state's claim that Mr. Galimanis did not assert his right to remain silent by demanding counsel before further interrogation by Officer Keiser, and that the state's evidence and arguments thereupon were not evidence and arguments about the assertion of that right, thus presenting a basis for distinguishing *Wainwright v. Greenfield* 474 U.S. 284 (1986) and *Doyle v. Ohio*, 426 U.S. 610 (1976), is not ripe for this court to review since the state courts have never had an opportunity to rule on the issue. The state did not make such an argument to the Colorado Court of Appeals or Supreme Court.

Under Colorado law, the state's failure to present the argument to the Colorado Court of Appeals, at least in the Petition for Rehearing, precluded the state's raising the argument in the Colorado Supreme Court. Colo. App. Rules 40, 52. *See* Appendix 3. Since there was no ruling by the Colorado Court of Appeals on the substantive issue on which the state petitions, namely the purported distinction between the assertion of the right to remain silent and the assertion of the right to remain silent until an attorney has been consulted, there has been no decision which conflicts with another court's ruling on the same issue. Further, since the Colorado Court of Appeals was never presented with the issue which the state contends exists here, that court has not decided the "important question of federal law" which the state contends should be decided by this court. Thus, the grounds relied upon by the state under this Court's Rules 10.1 simply do not exist. Given the state's failure to suggest the current distinction or factual scenario below, it is not surprising that the

Colorado Court of Appeals' opinion does not reflect the disagreement with another court's decision which the state contends it does. It reflects instead a straightforward application of this court's decision in *Greenfield*.

C. THE EXISTENCE OF NUMEROUS OTHER, UNRESOLVED ISSUES PERTAINING TO THE PERTINENT EVIDENCE AND ARGUMENTS, AS WELL AS ANOTHER UNCHALLENGED ERROR DURING THE SANITY TRIAL, WOULD RESULT IN A PURELY ADVISORY OPINION FROM THIS COURT.

Mr. Galimanis raised the issues to the Colorado Court of Appeals and Supreme Court that the state's use of evidence of his assertions of his rights to counsel and to remain silent as evidence of sanity, and its arguments concerning that evidence, violated the Fifth and Sixth Amendments by penalizing the assertions of those fundamental rights. *See e.g.*, *Spevak v. Klein*, 385 U.S. 511 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965). Mr. Galimanis also claimed that the introduction of that evidence violated the federal constitutional right to remain silent and right to counsel under *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981). It seems plain that the second, police-initiated advisement and the subsequent assertion of rights were in done in violation of *Edwards v. Arizona*'s proscription of such police practices. The Colorado Court of Appeals predictably did not address those issues since it reversed under *Greenfield*. These other issues also interweave with the issues presented by the state. Any attempt by this Court to resolve only a portion of the total legal scenario of this case would almost surely result in a convoluted and extremely narrow holding.

The Colorado Court of Appeals did rule that the trial court's suppression of evidence of a lay opinion of Mr. Galimanis' mental condition by his mother was error, but did not address "whether the error is reversible." *People v. Galimanis*, 765 P.2d 644, 648 (Colo. App. 1989).

Thus, any decision by this Court on the very narrow legal and factual grounds which the state's petition at best presents would not provide the state with any relief. This Court at most would merely be able to remand the cause to the Colorado Court of Appeals for resolution of the numerous other issues.

D. THE COLORADO COURT OF APPEALS' HOLDING THAT THE ERROR WAS NOT HARMLESS IS UNWORTHY OF REVIEW SINCE IT PRESENTS A PURELY FACTUAL AND CASE-SPECIFIC ISSUE, AND THAT COURT PLAINLY APPLIED THE CORRECT LEGAL STANDARD AND CONSIDERED THE RELEVANT FACTS AND CIRCUMSTANCES IN ARRIVING AT ITS CONCLUSION.

The state must prevail on both of its issues in order to gain relief in this case, since it admits error as to the admission of evidence of the second assertion of rights by Mr. Galimanis. The state does not contend that the Colorado Court of Appeals applied an incorrect legal standard in its determination that the error was not harmless beyond a reasonable doubt. The state does not and could not justifiably contend that the Colorado Court of Appeals failed to consider relevant facts or circumstances of this case in arriving at its decision that the error was not harmless. Rather, it contends only that the state court arrived at an incorrect decision on the narrow facts of this case.

The Colorado court plainly applied the correct standard and considered the appropriate criteria. It held:

> The record shows that a motion *in limine* was filed by the prosecution for the sole purpose of admitting the evidence. There was considerable testimony offered to show that defendant was insane, and the statements in question were admitted solely for the purpose of attempting to show defendants' rationality shortly after his apprehension. Also, considering the prosecution's reliance upon the evidence throughout the proceedings, we conclude that the error was not harmless beyond a reasonable doubt. *See United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985), *cert. denied*, 474 U.S. 1009, 106 S.Ct. 535, 88 L.Ed.2d 465 (1985).

People v. Galimanis, 765 P.2d at 648.

Since the Colorado court applied the correct standard and considered the proper criteria, its decision is simply not properly a matter for this court's review.

The state's attempted distinction of the bifurcated nature of the sanity trial is spurious in light of this Court's holding in *Greenfield* rejecting Florida's virtually identical argument that "proof of sanity is significantly different from proof of the underlying offense, and that the *Doyle* due process rationale thus does not apply." 474 U.S. at 292.

> We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining a conviction. The implicit promise, the breach and the consequent penalty are identical in both situations."

Greenfield, 474 U.S. at 292.

The state offers no rationale in support of its proffered distinction that was not rejected by this Court in *Greenfield*.

It is worth noting that in Colorado, contrary to other jurisdictions, sanity is not merely a discretionary statutory affirmative defense, but is an actual essential element of the guilt of the accused in every case in which the issue exists. *Parks v. District Court*, 180 Colo. 202, 503 P.2d 1029 (1972); *People ex rel Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741, 746 (1968). The state's attempt to draw a distinction between sanity and the other elements of the charged offenses fails as a matter of state law. *Doyle v. Ohio*, 426 U.S. 619 (1976) applies directly to the sanity trial in this case since the issue was "guilt" in the same sense as in *Doyle*. In any case, in *Greenfield*, this Court rejected the distinction between sanity

determinations and trials on the "not guilty" plea which the state relies upon here.

The state does not supply this Court with an adequate factual basis upon which to decide whether to review the Colorado court's decision. The petition contains no citations to the record. The record in this case is quite lengthy, thirty seven (37) volumes, and the evidence of Mr. Galimanis' severe, debilitating mental illnesses is voluminous. Further, the state's recitation of the facts can only lead this court to an improvident decision. For example, the state omits from the petition any mention of its arguments during opening statements at the sanity trial, where it contended that the evidence of assertions of rights was evidence of sanity. It fails to provide this court with other statements of the prosecutors during the trial regarding Mr. Galimanis' assertions of rights. Its assertions that it did not rely heavily on the assertions of rights at the sanity trial are thus not worthy of credence. It presents selective and out-of-context descriptions of Mr. Galimanis' illnesses in order to bolster its harmless error contention. While Mr. Galimanis has attempted to provide this Court with many of these obviously important facts, he cannot guarantee this Court that he has supplied this Court with such a complete view of the pertinent facts as this Court might require.

It is for reasons such as these that this Court should be loathe to decide to review a state court's legally sound determination that an error was not harmless.

E. THE COLORADO COURT OF APPEALS' DECISION TO REVERSE IS BASED ON ONLY ONE OF THE TWO VIOLATIONS OF *WAINWRIGHT V. GREENFIELD*, AND THUS ANY DECISION BY THIS COURT ON THE MERITS OF THAT DECISION WOULD BE SPECULATIVE AND COULD NOT RESULT IN A JUDGMENT FOR THE STATE.

The Colorado Court of Appeals' decision to reverse the sanity judgment is based on only one of the two violation of *Wainwright v. Greenfield* which occurred in this case. While

the state presented evidence of and arguments concerning *two* separate advisements and assertions of rights by Mr. Galimanis, and both were the subject of Mr. Galimanis' appeal, the Court of Appeals' opinion is patently singular. *E.g.*:

> In the present case, after being given *a Miranda* advisement, defendant asserted his right to an attorney before questioning by police. This **assertion** was used by the People as probative of defendant's sanity at his sanity trial.

People v. Galimanis, 765 P.2d at 647 [boldface emphasis added].

Any decision by this Court to review that court's decision would result in unavoidable speculation about which of the two incidents formed the basis of the reversal. Further, the state's arguments concerning the first of the two incidents may well be, and should be presumed to be superfluous. Review of the Colorado Court's decision that the error it addressed was not harmless would be speculative. Further, any decision by this Court would be of no ultimate use to the state since the same result would only occur based on the other incident of error.

F. AS DEMONSTRATED BY THE DEARTH OF LITIGATION AND CONTROVERSY ABOUT THE RULE OF *DOYLE* AND *GREENFIELD*, THE STATE'S PURPORTED DISTINCTIONS OF THIS COURT'S PRIOR DECISIONS WOULD SERVE ONLY TO CLOUD BRIGHT LINE RULES WHICH WORK WELL.

This Court's rulings in *Greenfield* and *Doyle* are the subject of little litigation and less controversy. This is because they are bright line rules, easy of application, with strong underlying principles. As demonstrated by Mr. Galimanis' case, they do not result in the state being unable to prosecute cases. The state called eight police officers to testify about Mr. Galimanis' conduct and statements after his arrest. This court recognized as much in *Greenfield*, 474 U.S. at 294-295:

> [T]he State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurances that the invocation of those rights will not be penalized.

As noted in A., above where it is revealed that the allegedly inconsistent ruling of the Pennsylvania Supreme Court in *Comm. v. Hunsberger*, 523 Pa. 92, 565 A.2d 152 (1989), is nothing of the sort, there is none of the "confusion and conflict" which the state alleged exists and need be addressed by this court.

Thus, there is no substantial reason for this court to undertake the process of sorting through the facts and circumstances of this complex and multi-faceted case. The rule works, there is no need to fix it.

RESPONSE TO THE STATE'S ARGUMENT I.

The state contends that the Colorado Court of Appeals erred by applying *Wainwright v. Greenfield*, 474 U.S. 284 (1986), and *Doyle v. Ohio*, 426 U.S. 610 (1976), where an accused demanded counsel before further interrogation in response to the *Miranda* warnings, as opposed to a situation where the accused did not demand counsel and only "asserted the right to remain silent," and where the prosecution did not "comment upon an accused's silence," but "only . . . comment[ed] upon the exercise of the right to counsel." State's petition at 10. Neither the factual predicates nor the legal bases for the state's contentions bear scrutiny.

The state's contention is apparently that an accused's demand that he not be interrogated without the presence of counsel, made after *Miranda* warnings, is not an assertion of the right to remain silent, but is in fact merely an assertion of the right to counsel, meaning that the rationale of *Doyle* and *Greenfield* should not apply. Petition at 10. As noted in A., above, this Court decided this precise point contrary to the state's position in

Greenfield. *See* 474 U.S. at 295, n. 13 and accompanying text.

Further, the state's argument misapprehends the facts of Mr. Galimanis' case and incorrectly characterizes the state's use of the evidence in this case.

The state's argument is directed only at the evidence and argument relating to Mr. Galimanis' assertion of his rights to Officer Keiser. Keiser read the *Miranda* warnings to Mr. Galimanis and inquired whether Mr. Galimanis understood those advisements. Then the officer began asking Mr. Galimanis questions without inquiring whether he wished to waive those rights.[4] As anticipated by *Miranda*, *Edwards v. Arizona*, 451 U.S. 477 (1985), *Greenfield* and the *Miranda* warnings given him by Officer Keiser, Mr. Galimanis asserted his right to remain silent by informing the policeman that he wanted an attorney. It is simply remarkable that the state now contends that something else was understood by Mr. Galimanis, Officer Keiser, the prosecution or the jury.

In the factual context of this case it is simply not reasonable to suggest that Mr. Galimanis' assertion of rights was not an assertion of the right to remain silent, that the evidence was not evidence of the assertion of the right to remain silent, or that the state's argument and comments were not arguments and comments on the assertion of the right to remain silent. Neither Mr. Galimanis nor any juror would have interpreted the *Miranda* advisements or Mr. Galimanis' assertion or the prosecutors' arguments and comments as the state suggest they must be. Just as this Court recognized in *Greenfield*, there is no rational basis for drawing a line between the right to remain silent and the right to remain silent until consulting with an attorney. The state suggest no basis for that distinction, nor did the state see such a distinction before its petition to this court. As noted in B. above, the prosecution throughout the trial and appeal in this case either referred to the assertion of

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4. The state's implied and express assertions that the police had reason to think that Mr. Galimanis was armed with a gun, petition at 4, 12. are totally false. The record does not contain any evidence or allegation to support such a notion. Although the rationale behind the state's reliance upon *New York v. Quarles*, 467 U.S. 649 (1984) is not apparent, since there was no basis in fact for the inquiry by Officer Keiser it cannot be used as a means for circumventing the Due Process Clause.

the right to counsel along with the right to remain silent as the unit they clearly are, or it lumped together the assertions of "rights" without any of the supposedly critical differentiation it now claims. There is no reason whatsoever to think that Mr. Galimanis or the jury recognized a distinction which the prosecutor missed for seven years.

The state's characterization of the evidence and its arguments as merely presenting an assertion of the right to counsel is not supported by the record. Further, the state's statement of the proceedings and evidence badly distorts the manner in which and purposes for which the state used the evidence. In fact, the state overtly considered, and urged the jury to consider the evidence, as evidence of the assertion of the right to remain silent, which it obviously was in any case. Thus, the state's attempted distinction between assertions of the right to counsel and right to remain silent, if it had any validity otherwise, simply did not exist in this case due to the prosecution's own actions and statements.

This case differs from *Greenfield* only in that here the constitutional violations by the state were more numerous and more egregious and the objections to them better preserved.

The state successfully moved to present the evidence over Mr. Galimanis' objection. Thus, unlike *Greenfield*, where only the final arguments were objected to, all of the evidence and resulting comments and arguments were admitted and made over objection. Unlike *Greenfield*, where only the prosecutor's actual arguments, *i.e.*, the state's ultimate and *express* use of the evidence was at issue, here the prosecution's actual arguments are not the only inquiry. *See* concurring opinion of Chief Justice Rehnquist in *Greenfield*, 474 U.S. at 301, which makes this distinction but nevertheless joins in the decision. Every aspect of the state's evidence and argument at this case is open to inquiry, and that inquiry makes it clear that the state did not recognize or respect the distinction it relies upon so completely now.

It is no wonder that the state has never made this argument before.

Further, contrary to its arguments to this Court, the state successfully moved to have all of its evidence considered to be affirmative evidence of sanity, **not rebuttal of the accused's evidence of insanity.**[5] The state's assertions of the "rebuttal" nature of the

pertinent evidence are disingenuous and, as a matter of the facts and law of this case, false. In order to prevail the state apparently must have this Court "find" the opposite of what it already successfully urged the state court to find.

The state argued the assertions of rights as follows during its opening statement:

> So they take the defendant and they put him in Al Keiser's patrol car. While he is there, Al Keiser orally advises him of his *Miranda* rights, the rights you have probably all heard on TV a number of times. He does this orally and the defendant responds he understands and he says I want my lawyer. (vol. 8, p. 22)
>
> You will hear from Detective Light, who, down at the Denver Police Department, advises the defendant of the nature of the charge, what he was being held for, first degree murder. A written advisement form was used which you will see which outlines the *Miranda* warnings that Al Keiser gave orally. Those were explained to the defendant. He said he understood. He sat back in his chair and said I want my lawyer here. (vol. 8, p. 24-25)

Since, in law and common sense fact, a demand for an attorney is an assertion of the right to remain silent, here the state was contending that the assertion of those rights was evidence of sanity, just as the court had ruled it could contend. No such uncontested arguments occurred in *Greenfield*.

Defense counsel made **no** opening arguments and called **no** witnesses throughout the trial regarding Mr. Galimanis' conduct after arrest. They did not examine any expert witness regarding the matter. They **only** cross-examined witnesses called by the state in its effort to show that Mr. Galimanis acted rationally and normally after the arrest. Any intimation to the contrary in the state's petition is incorrect.[6]

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5. The state moved *in limine* at the outset of the trial to have the court rule that its evidence be considered part of its case in chief, not as "rebuttal" evidence. The court granted that motion. (vol. 1, p. 89; vol. 7, p. 2-5)

6. For example, at page 7, in the midst of its recitation of the evidence presented by Mr. Galimanis at trial, the state alleges that, "Respondent also elicited how a deputy sheriff called by the prosecution noted "suicidal ideation" on a written form completed a few hours after respondent's arrest and how this same officer recommended counseling for him." In fact, that officer was called out of order as a favor to the state, and the state called him solely to testify as to Mr. Galimanis' allegedly normal behavior after his arrest. Truly, during cross

In *Greenfield*, the evidence consisted of testimony of police officers that the accused had refused to speak to them but had demanded an attorney when given *Miranda* warnings. The evidence here was not only the of the same type from Officer Keiser and Detective Light, but further testimony from three psychiatrists, all under the state's questioning, of the importance of the assertions of rights, *i.e.*, the refusal to cooperate with the police, in a psychiatric sense. The state's failure to provide this Court with that critical testimony from the two defense experts it cross-examined, while duplicating the testimony of its own psychiatrist, is indicative of the caution this Court should exercise in this matter.[7]

The first actual evidence of the assertions of rights came during the state's cross-examination of Dr. Miller, an experienced forensic psychiatrist called as a witness by Mr. Galimanis, who concluded that Mr. Galimanis was obviously severely mentally ill. The prosecutor asked:

> Q: All right. Did you read the reports from Wheat Ridge and Denver concerning descriptions of his behavior while he was in the patrol car and also being advised of *his rights, asserting his rights*?
>
> A: Yes.
>
> Q: Isn't it true that in a forensic examination, that kind of evidence is important?
>
> A: It was important.
>
> Q: It was?
>
> A: Yes.
>
> Q: It shows some awareness of what is going on, the fact that he is charged with something very serious, *he elects to preserve his rights, to defend himself against those charges*; is that

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examination his assertions of normalcy were refuted by his admissions that he had noted "suicidal ideation" and recommended counseling.

7. The state's insistence that it was merely responding to, or "rebutting" defense evidence with its extensive evidence of Mr. Galimanis' assertions of rights, is totally unfounded.

right?

A: It shows some awareness of that, probably. (vol. 11, p. 136-137, emphasis added).

The state also cross-examined Dr. Kathy Morall, another experienced forensic psychiatrist who testified that Mr. Galimanis was insane and severely mentally ill, on the same issue. After establishing that Dr. Morall had read and considered the police reports, the prosecutor asked her:

Q: Do you remember when the police came, they arrested him?

A: Yes.

Q: And they took him into custody?

A: Yes.

Q: And they read him his rights?

A: Yes.

Q: And he said, "I want my lawyer?"

A: Yes. (vol. 10, p. 91-92)

Later, the following occurred:

Q: We're not isolating it here. We are giving a whole bunch of facts which outline his activities, which shows not random but given his options some fairly rational things of what he was doing?

A: I guess my interpretation of it would be giving

Q: And he even tells you where he's arrested, South Yates Way, **and don't you think when someone is arrested and they are told, you are being charged with first degree murder and they read your rights to you, isn't it a natural response not to incriminate yourself? You don't want to tell them something that is going to make it easier?**

A: There is an urgency to questions. I don't know that that would be a general statement I would agree.

Q: Don't you think someone who is charged with first degree murder is going to be aware there is a relative risk here to him?

A: It could be.

Q: That's one way of looking at it, right?

A: You could look at it.

Q: That's an inference you could draw from those facts, right?

A: Yes.

Q: That would be a reasonable inference?

A: I wouldn't draw them -- I wouldn't say someone else is being unreasonable. (vol. 10, p. 96-97, emphasis added.)

The state admits it also questioned its psychiatrist, Dr. Wahl, on the assertion of rights. The state's central assertion that its question: "And were you aware of the defendant's request for a lawyer upon his arrest, as well as his general appearance and demeanor, at that time?" did not relate to or call for any mention of the refusal to speak to the police, petition at 13, is obviously unfounded, for several reasons. The immediately preceding question: "Did you have the opportunity to review reports compiled by both police officers form the Denver Police Department, as well as officers from the Wheat Ridge Police Department pertaining to the defendant's arrest on April 21?" related directly to both the assertions to Officer Keiser and the assertions to Detective Light, which the state admits were assertions of both the right to remain silent and right to counsel.

In light of this record and the common sense and legally necessary principle that Mr. Galimanis was asserting his right to remain silent when he told Officer that he wanted an attorney, the state's assertion in its petition that "the brief mention of [Mr. Galimanis'] silence by Light and Wahl" was harmless error is a mere manipulation of the record.

In *Greenfield* the prosecution argued that Mr. Greenfield's statements that he understood his rights, that he did not want to speak to the police and that he wanted to speak to an attorney, showed "an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act," and thereby, his sanity. *Id.*, 474

U.S. at 287, n. 2. The prosecution did not limit or even direct its arguments specifically to the right to remain silent as opposed to the right to counsel, just as this Court did not limit its holding in that case.

Here, in addition to its opening statements and its comments and arguments with Mr. Galimanis' witnesses, the prosecution argued as set forth by the state in Appendix H. The state referred to the exercise of rights as the "most telling" facts, and it made virtually the same argument which constituted reversible error in *Greenfield*. The prosecutor recognized then that the assertions of right to Light and to Keiser meant "the same thing."

Throughout trial the state repeatedly and consistently characterized the evidence as evidence of Mr. Galimanis' assertion of his "rights." Given the *Miranda* warnings themselves, and the evidence presented of them by the state's witnesses, these numerous comments can only be interpreted to refer to assertions of the right to remain silent **and** the right to counsel before interrogation.

Thus, the "unresolved question" has been resolved, and, in any case, is so easily answered based on well-established law, common sense and the facts of this case that it hardly merits this Court's attention.

RESPONSE TO STATE'S ARGUMENT II.

The state admits that the introduction of the evidence of Mr. Galimanis' assertion of rights to Detective Light and the prosecutorial comments thereupon were error under *Wainwright v. Greenfield*, 474 U.S. 284 (1986) and *Doyle v. Ohio*, 426 U.S. 610 (1976). Petition at 12-13, 14. It contends that these errors were harmless for several manifestly inconsistent reasons, none of which bear scrutiny. In fact, the harmless error allegations are completely unfounded in fact and law.

The state's assertions that it did not comment on the exercise of rights is patently incorrect. It did so repeatedly. Its distinction between the right to remain silent and right to remain silent until consulting with counsel is baseless, given this Court's common sense

holding in *Greenfield* that an assertion of the right to remain silent until consulting with an attorney is indistinguishable from the assertion of the right to remain silent, the facts of this case, *i.e.*, the warnings given Mr. Galimanis and his statements, and the state's comments, characterizations and arguments regarding that evidence.

The state does not contend that the admission of the evidence of the first assertion of rights and the state's comments thereupon were harmless, if erroneous. Since this Court expressly decided the question presented here by the state in its first Argument in *Greenfield*, there can thus be no argument that the multiple errors were harmless.

Further, as noted above, since the Colorado Court of Appeals' holdings of error and that the error was not harmless were based on only one of the two assertions of rights by Mr. Galimanis in this case, the state's harmless error argument must fail. Any review of that holding by this Court would be plainly speculative.

The state begins its argument with the assertion that the bifurcated nature of the sanity trial in Mr. Galimanis' case presents a novel and critically different situation than in *Greenfield*. The state suggests that this is so because silence after *Miranda* warnings is "insolubly ambiguous" and is thus of minimal relevance or probative value in a sanity trial. This hollow argument is based on a misapprehension and misstatment of the bases of this Court's decisions in *Doyle* and *Greenfield*, and is belied by the state's heavy emphasis at trial on precisely the evidence it now asserts is essentially irrelevant.

Initially, the connection between the bifurcated trial and the allegedly "insolubly ambiguous" nature of the evidence and arguments is a mystery. The state suggests no substantive reason why the evidence and arguments are more ambiguous, or their use less unfair, because of the bifurcated trial. Thus, the state offers distinctions without a difference.

Further, this Court explicitly rejected the State of Florida's argument in *Greenfield* that the use of the accused's silence during a sanity proceeding was significant. 474 U.S. at 292-293. See part D., above. The state merely re-hashes the arguments this Court resolved

in *Doyle* and *Greenfield*. Thus, in essence the state's "novel" distinction has already been found to be insignificant by this Court.[8]

This Court based its decisions in *Doyle* and *Greenfield* primarily on the unfairness of the state's use of silence when it had implicitly assured the accused that such silence would not be used. In *Greenfield* Florida argued, as the prosecution did at the trial in this case, that the evidence of the assertions of rights was especially probative of sanity. This court responded:

> "We need not evaluate the probative value of respondent's silence to reject this argument. For the ambiguity of the defendant's silence in *Doyle* merely added weight to the court's principle rationale, which rested on the implied assurance contained in the *Miranda* warning. [Citations and footnote omitted.] The Attorney General's argument about the probative value of silence therefor fails entirely to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances."

Greenfield, 474 U.S. at 293-294.

Thus, even if the underlying assertion that the bifurcated sanity trial resulted in some more "ambiguity," the state would not be entitled to relief.

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8. This Court's holding in *Greenfield* rejecting Florida's virtually identical argument that "proof of sanity is significantly different from proof of the underlying offense, and that the *Doyle* due process rationale thus does not apply." 474 U.S. at 292, is dispositive.

> We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining a conviction. The implicit promise, the breach and the consequent penalty are identical in both situations."

Greenfield, 474 U.S. at 292.

The state offers no rationale in support of its proffered distinction that was not rejected by this Court in *Greenfield*.

Further, the ambiguity of such assertions of rights was *a* reason why this Court ruled in *Doyle* and *United States v. Hale*, 422 U.S. 171 (1975) that such evidence and arguments were improper. The state condemns its own argument.

When it moved for the introduction of the evidence, the state alleged that it was "clearly probative of the defendant's mental state at a time close in proximity to the date of the occurrence." (vol. 1, p. 83) The state's present contrary position is disingenuous.

The state's attempt to minimize the importance of its evidence of and arguments concerning the assertions of rights is belied by the state's statements, arguments and positions during trial. As noted above and by the Colorado Court of Appeals, and as is immediately obvious from the facts and proceedings of this case, the state's position at trial was that the evidence of assertions of rights was extremely probative and important to its case, indeed, that *it was the "most telling" evidence of Mr. Galimanis' sanity*. (See prosecutor's closing argument.) The state filed a pretrial motion asking leave to introduce the evidence on the ground that it was "clearly probative"; it argued the evidence as relevant in opening statements; it called two witnesses to testify extensively about the assertions of rights; it cross-examined two of Mr. Galimanis' experts about the assertions of rights; it asked its own expert about the assertions of rights, and it described the evidence as the "most telling" evidence of Mr. Galimanis' sanity.

The state does not contend that the Colorado Court of Appeals applied an incorrect legal standard in its determination that the error was not harmless beyond a reasonable doubt. The Colorado court plainly applied the correct standard and plainly considered the appropriate criteria. It held:

> The record shows that a motion *in limine* was filed by the prosecution for the sole purpose of admitting the evidence. There was considerable testimony offered to show that defendant was insane, and the statements in question were admitted solely for the purpose of attemtpting to show defendants' rationality shortly after his apprehension. Also, considering the prosecution's reliance upon the evidence throughout the proceedings, we conclude that the error was not harmless beyond a reasonable doubt. *See United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985), *cert. denied*, 474 U.S.

1009, 106 S.Ct. 535, 88 L.Ed.2d 465 (1985).

People v. Galimanis, 765 P.2d 644, (Colo.App. 1988).[9]

Given that the Colorado Court of Appeals applied the correct legal standard and considered the proper criteria, its decision is simply not properly a matter for this court's review.

The state's only allegations are that that court failed to appreciate the significance of the bifurcated proceeding and that it made a mistake, based on the unique facts of this case. As noted above, since the state is completely unable to suggest a substantive reason, or one not already rejected by this court in *Greenfield*, why the bifurcated trial made the use of the assertions of rights less unfair or less prejudicial, it is no wonder that the Colorado Court of Appeals did not expressly consider that phantom issue. This Court should not grant the writ merely to consider whether a state court which has facially addressed the proper criteria and applied the proper legal standard made a mistake in its conclusion that constitutional error was not harmless.

The state does not contend that there was "overwhelming" evidence of sanity, for obvious reasons. Mr. Galimanis presented extensive and compelling evidence of severe, long-standing mental illnesses, and testimony from highly qualified experts that he was legally insane. The state's own witnesses, called to recount his "normal" behavior at the time

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9. *United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985, *cert. denied*, 474 U.S. 1009 (1985), contains the following analysis of such a harmless error analysis:

> In [*United States v. Massey*, 687 F.2d 1348 (10th Cir. 1982)] we delineated five factors which are relevant to determining whether the comments are harmless, these factors include:
>
> "1. The use to which the prosecution puts the postarrest silence.
> 2. Who elected to pursue the line of questioning.
> 3. The quantum of other evidence of guilt.
> 4. The intensity and frequency of the reference.
> 5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions."
>
> 687 F.2d at 1353, citing *Williams v. Zahradnick*, 632 F.2d 353, 361-362 (footnotes omitted) (4th Cir. 1980).

of his arrest, told of his often quite strange behavior at that time.[10] Its lay witnesses, called to recount his "normal" behavior before his arrest, testified as to more extremely strange behavior.[11] Its one expert witness, Dr. Wahl, who had never before testified on the issue of sanity, incredibly admitted that he was unaware of any evidence of psychosis in Mr. Galimanis' history, after Mr. Galimanis had been involuntarily committed in 1981 because he was dangerously psychotic, and after he remained psychotic for some months thereafter despite heavy drug therapy. Further, Dr. Wahl admitted that he ultimately agreed with the diagnosis of other psychatrists that Mr. Galimanis suffered from borderline personality disorder, which necessarily involved psychotic episodes. He contended that Mr. Galimanis would have been shocked out of his psychosis by the action of cutting his girfriend's head off. He did not address the fact that she had already been beaten and stabbed several times, perhaps fatally, before the decapitation began.

The state's assertion of "substantial" evidence that Mr. Galimanis was not psychotic begs the question of whether a violation of constitutional rights is "harmless."

The remaining arguments by the state are either mere re-hashings of the arguments this court rejected in *Greenfield* and *Doyle*, or are *non-sequiturs*, unworthy of this Court's attention.

CONCLUSION

For the foregoing reasons this Court should deny the Petition for Writ of Certiorari.

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10. As noted by the Colorado Court of Appeals. 765 P.2d at 645-646: "When awakened, he was somewhat incoherent and disoriented." The record reveals that Mr. Galimanis was sleeping in blood soaked jeans in the car belonging to the girlfriend he had recently killed, he had no money, he carried on a laughing conversation with himself, he was primarily and apparently *only* concerned with the car, he repeated his last name numerous times for no visible reason, and even the police noted his "suicidal ideation" and that he needed counseling.

11. For example, one state's witness recounted Mr. Galimanis' usual behavior of sitting in his dismantled auto for hours, honking the horn, and his actions a few days before the killing of walking for hours back and forth on a basketball court, slowly disrobing.

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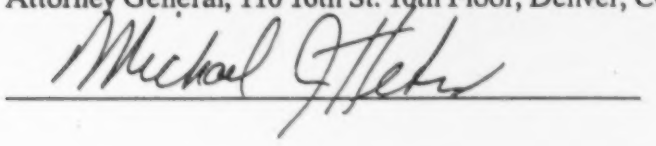
CERTIFICATE OF SERVICEU

I certify that the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served on Gale Norton, attorney for the Petitioner, by depositing a copy of the brief in the United States Mail, postage paid, on May 30, 1991, addressed to Ms. Gale Norton, Attorney General, 110 16th St. 10th Floor, Denver, CO, 80202.



APPENDIX 1

RECEIVED
District Court
Jefferson

DISTRICT COURT, JEFFERSON COUNTY, COLORADO

NO. 83CR364 DIVISION 8

AUG 1[illegible]

MOTION IN LIMINE-III

JEFFERSON COUNTY, COLORADO

Division C

Enter

FILE

AUG 19 1983

FILED IN THE DISTRICT COURT

THE PEOPLE OF THE STATE OF COLORADO

v.

PHILIP LESLIE GALIMANIS,

Defendant.

NOLAN L. BROWN, District Attorney in and for the First Judicial District, County of Jefferson, State of Colorado, requests the Court enter the following orders regarding the procedure to be utilized in the sanity trial.

[1] That the Court in its discretionary power designate the order in which the proof comes before the jury.

[2] That the Court designate whether the presumption of sanity is the People's case in chief.

AND AS GROUNDS THEREFORE STATE:

[1] The Court has discretion to designate the order in which the proof comes before the jury. Elliott v. People, 400 P. 2d 687 (1971). C.R.E. 611 (a).

[2] The presumption of sanity is not evidence, its primary purpose is one of procedural convenience. People v. Kernanen, 497 P. 2d 8 (1972). It is no more than a rule of evidence. Gomez v. Dist. Court, 500 P.2d 134 (1972).

[3] The presumption retains its vitality until some evidence to the contrary is presented. People v. Johnson, 503 P.2d 1019 (1972).

[4] Whether the defendant has raised the issue sufficiently to rebut the presumption of sanity is initially a question of law. People v. Johnson, 503 F.2d 1019 (1972).

[5] That "any" even "token" evidence of insanity is sufficient to overcome the presumption of sanity. People v. Ware, 528 P.224 (1979) C.R.S. 1973, 16-8-105 (2).

[6] Once the Court makes this determination, the burden of proof is on the People to prove sanity beyond a reasonable doubt. People v. Wright, 648 P.2d 665 (1972). People v. Ware, supra.

WHEREFORE the People request the Court to designate that if the defense presents "token" evidence of insanity to rebut the presumption, the People's case in response to this will be their case in chief and that the presumption of sanity is not the People's case in chief.

NOLAN L. BROWN
District Attorney

By _____ 8587
Steve Jones, Reg. No. 8587
Deputy District Attorney

CERTIFICATE

I hereby certify that I have this 19th day of August, 1983, delivered to the Public Defender's Office two copies of the above and foregoing Motion in Limine III.

_____

APPENDIX 2

DISTRICT COURT, JEFFERSON COUNTY, COLORADO

Criminal Action No. 83CR0364, Division 8

REPORTER'S TRANSCRIPT VOLUME 1

84CA0209

RECEIVED JUN 6 1985 GARY SOURE Clerk, Court of Appeals

FILED IN THE COURT OF APPEALS STATE OF COLORADO JUL 29 1985 GARY SOURE Clerk, Court of Appeals

THE PEOPLE OF THE STATE OF COLORADO,

v.

PHILIP LESLIE GALIMANIS,

Defendant.

The sanity trial in this case was held on August 22 through September 1, 1983 before the HONORABLE MICHAEL C. VILLANO, Judge of the District Court, and a jury of twelve.

This volume contains the proceedings held on August 22 and 23, 1983. Morning session of August 24, 1983.

For the People: STEVE JONES, No. 8587
MARY A. MALTESTA, No. 9837
Deputy District Attorneys

For the Defendant: ALEXANDER GARLIN, No. 7497
VICTORIA J. KOURY, No. 9805
Deputy State Public Defenders

AUGUST 22, 1983

THE COURT: 83CR364, The People of the State of Colorado versus Philip Galimanis. Counsel please enter their appearances.

MR. JONES: Steve Jones and Mary Malatesta appearing for the People.

MR. GARLIN: Alexander Garlin and Victoria Koury, who's here in the other room, appearing along with Philip Galimanis. He is present.

THE COURT: All right. I have a couple of motions in limine. Would you like to proceed, Mr. Jones?

MR. JONES: Yes. We have three, I believe. The defendant filed a Motion in Limine No. 8 concerning Jim Marston and also we had the defendant's Motion in Limine No. 1 to take up about the pictures. If we could take that up last, the pictures, I will start with the three we have. I would like to make sure the Court has copies of all three of our motions in limine.

THE COURT: Well, what are the other two? I have Motion in Limine 3 which is with regard to the procedure, which I thought I'd already ruled on. I don't understand why you have another motion.

MR. JONES: We just want to get a fix on where we are going to be, given a certain presentation of testimony that is going to occur here. I have no problem with the

Court's earlier order. This motion addresses the procedures after the presumption and any evidence that has been admitted by the defendant. That is the nature of that motion in limine. It has nothing to do with the original one that was filed by Mr. Garlin concerning initial procedure. This occurs afterwards in the presentation of evidence.

Does the Court want me to go forward on that?

THE COURT: Yes.

MR. JONES: Okay. The problem I have, Your Honor, is that it has never been very clear and there seems to be a number of different schools of thought on whether the presumption is the case in chief; in other words, if we do not present any evidence and we rest on the presumption, then the defendant presents some evidence of insanity, and that we respond to that, which we must to meet our burden of proof, whether that would put us in a rebuttal posture at that point. I would argue, Your Honor, that if the defendant puts on token evidence, any evidence or token evidence of insanity just to raise the issue, that the presumption that we talked about before is simply a matter of procedural convenience, it's not a rule of evidence, if there is simply token evidence, our initial case would be our case in chief. At that point, the defendant most likely would put on, if any, their testimony for their case in chief. I think it is no secret here they have a number of witnesses, including six experts, who will

be testifying concerning the defendant's mental illness. If we wish to respond to that, that would put us in a rebuttal posture. So I think it is important to clear up at the outset whether the presumption is the case in chief or whether our initial response to any evidence is our case in chief.

I would argue that if there is token evidence, our initial response is our case in chief and any evidence after that would be their case in chief and then our response would be rebuttal, if any. And I would state just basically what the motion says. It's up to the Court in terms of order of proof. That is what I am talking about here, basically.

I would also note that in the instructions that the Court is going to read to the jury, specifically the one after the jury is impaneled, it contemplates this exact procedure, the instruction right after the panel is sworn, I believe the third, fourth and fifth paragraphs contemplate the exact thing I am talking about here because we always have the burden of proof. This isn't a question of whether or not we have the burden of proof. I am not arguing that. I just want to know where I am at given stages of the trial because the statute is a little bit unclear.

I would submit, then, that if there is token evidence, our case in chief would be our response and then rebuttal after that.

THE COURT: Let me hear from the defense.

MR. GARLIN: Just one thought, Judge, I'd offer briefly, and that is that resting on the presumption of evidence, I think, is essentially doing that in lieu of going forward in any other way. I think if that is what the prosecution choses to do, rest on the presumption of evidence of sanity, excuse me, then any response they make thereafter would be rebuttal.

THE COURT: Well, that is not the position the Court takes. My position is that as Mr. Jones outlined it. I think that is what is contemplated by our courts, is that the raising of the insanity issue is merely procedural. Thereafter, the prosecution will present their case in chief just as we would any other trial and they'll have an opportunity to rebut defense evidence.

MR. JONES: Okay. The other two we can take up, I think, fairly quickly, especially the first one. Our Motion in Limine 1 concerns the testimony of the people from Bethesda and Porter Hospitals. I think it is important for the Court to note, and I would make an offer of proof, that the defendant spent about eight, nine months at Bethesda and Porter Hospitals back in 1981.

THE COURT: When was that filed? I am trying to find a copy of that.

MR. JONES: That was filed right before we had

APPENDIX 3

ver Co. v. Pierson, 674

rivolous, and attorney's
rs v. Charnes, 656 P.2d
82).
suant to this rule denied.
653 P.2d 82 (Colo. Ct.

isdiction. See Wickland
App. 403, 565 P.2d 976

tate of Perini, 34 Colo.
3 (1974); In re Trask, 40
P.2d 825 (1978); Sports
iemmer, 42 Colo. App.
9); Applewood Gardens
Richter, 42 Colo. App.
979); In re Erickson, 43
P.2d 909 (1979); In re
op. 128, 613 P.2d 344
d Airlines, 638 P.2d 812
; In re Norton, 640 P.2d
1981); People in Interest
4 (Colo. Ct. App. 1982);
er Nat'l Ass'n v. Pierson,
Ct. App. 1982); Smith v.
Revenue, 661 P.2d 1192

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clerk of the appellate

(e) Costs on Appeal Taxable in the Trial Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the trial court as costs of the appeal in favor of the party entitled to costs under this Rule.

Cross references. As to costs incurred in civil actions in general, see § § 13-16-104 and 13-16-105, C.R.S.

Am. Jur.2d. See 5 Am. Jur.2d, Appeal and Error, § § 1009-1024.

Law reviews. For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953).

Costs, strictly so called, are a matter of statute or rule of court. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

Costs are recoverable only by virtue of the statute allowing them. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1899).

Costs are only to reimburse the successful party. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

For all trials of same cause. Where there is more than one trial of the same cause, the successful party is entitled to recover costs for all the trials. Wallace Plumbing Co. v. Dillon, 73 Colo. 10, 213 P. 130 (1922).

And including annexation proceedings. Under this rule the successful party may recover costs incurred in the supreme court upon appeal in annexation proceedings. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1898).

Where suit is instituted and prosecuted vexatiously, defendant's attorney fees may be taxed as costs. London v. Allison, 87 Colo. 27, 284 P. 776 (1930).

In action in mandamus to compel a city council to grant a permit, where judgment is for the plaintiff, he is entitled to recover from the defending officials who voted against granting the permit his costs taxed in the trial court, but not from those who voted in favor of granting the permit. City of Colorado Springs v. Street, 81 Colo. 181, 254 P. 440 (1927).

This rule does not include a case dismissed for want of jurisdiction. Bartels v. Hoey, 3 Colo. 279 (1877).

Objection barred after payment of costs. When there is no fraud or wrongful purpose or mistake of fact, one may not object further to a taxation of costs against him after he has paid them, or received payment thereof. Webber v. Phister, 71 Colo. 332, 206 P. 385 (1922).

Rationale for section (b) limitation. The limitation in section (b) stems from the basic concept that costs should not be charged against a sovereign state, unless the proper authority so directs. People in Interest of W.M., 643 P.2d 794 (Colo. Ct. App. 1982).

Applied in In re Trask, 40 Colo. App. 556, 580 P.2d 825 (1978); Caldwell v. Armstrong, 642 P.2d 47 (Colo. Ct. App. 1981).

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition may be typewritten as prescribed in C.A.R. 32 (b), and on the front cover there shall be the number and title of the case, the court from which the appeal was taken, the name

n Schoonover v. Hedlund Abstract
27 P.2d 408 (Colo. App. 1986).

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fs or copies of records shall
higher than those generally
charged pursuant to C.A.R.
costs of the appeal in favor
party who desires such costs
d verified bill of costs which
ce, within fourteen days after
986, effective November 1,

Courts. Costs incurred in the
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e appeal, and the premiums
al shall be taxed in the trial
party entitled to costs under
vember 1, 1986.)

hearing

to the third party defendants as
by C.A.R. 36. Brewster v. Nandrea,
1 (Colo. 1985).

CERTIORARI

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nal Family", see 67 Den. U.L. Rev.
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1989).

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No writ of certiorari shall issue
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in the Court of Appeals, except that in workmen's compensation and unemployment insurance cases the time for filing a petition for writ of certiorari is reduced to fifteen days. (Amended June 4, 1987, effective January 1, 1988.)

Rule 52. Review on Certiorari — Time for Petitioning

(b) To Review Court of Appeals Judgment. No writ of certiorari shall issue unless a petition for rehearing has been filed in the Court of Appeals. A petition for writ of certiorari to review a judgment of the Court of Appeals shall be filed not later than thirty days from the date rehearing is denied in the Court of Appeals, except that in workmen's compensation and unemployment insurance cases the time for filing a petition for writ of certiorari is reduced to fifteen days. (Amended and effective June 15, 1972; amended June 4, 1987, effective January 1, 1988.)

When a petition for rehearing of a municipal court judgment is timely filed in the district court, the district court judgment will not become final for purposes of this rule until the district court denies the petition. City of Aurora v. Rhodes, 689 P.2d 603 (Colo. 1984).

Rule 53. The Petition and Cross-Petition for Certiorari

(a) The Petition. The petition for certiorari shall be succinct and shall not exceed twelve pages, exclusive of appendix. The petition shall contain in the order here indicated:

(1) An advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered.

(2) A reference to the official or unofficial reports of the opinion or judgment and decree of the court, which shall be in an appendix containing the papers as provided in subsection (6) of this rule.

(3) A concise statement of the grounds on which jurisdiction of the Supreme Court is invoked, showing:

(A) The date of the judgment or decree sought to be reviewed and the time of its entry;

(B) The date of any order respecting a rehearing and the date and terms of any order granting an extension of time within which to petition for certiorari.

(4) A concise statement of the case containing the matters material to consideration of the issues presented.

(5) A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

(6) An appendix containing:

(A) A copy of any opinions delivered upon the rendering of the decision of the Court of Appeals;

(B) If review of a judgment of the district court on an appeal from a county court is sought, a copy of the findings, judgment and decree in question; and

(C) The text of any pertinent statute or ordinance.